Court File No.: T-1023-17

FEDERAL COURT

BETWEEN:

GEOPHYSICAL SERVICE INC.

Applicant (Plaintiff)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by ATTORNEY GENERAL OF CANADA

Respondent (Defendant)

WRITTEN REPRESENTATIONS OF THE APPLICANT, GEOPHYSICAL SERVICE INCORPORATED

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OVERVIEW

1. This Appeal concerns the misinterpretation by the Prothonotary of the cause of action known as "confiscation" or "*de facto* expropriation". Geophysical Service Incorporated ("GSI") brings this Appeal as a result of the Order and Reasons issued by this Court in 2018 FC 670[1] (the "Decision"), in which this Court granted the motion to strike the Statement of Claim brought by the Attorney General of Canada ("AGC").

2. GSI submits that the Prothonotary erred in ignoring the already settled law that the legislative scheme regarding offshore oil and gas development (the "Regulatory Regime"), has been determined to be "confiscatory" or a "compulsory license" of offshore seismic data. That jurisprudence held that copyright accrues independent of the legislative scheme, as otherwise there would be nothing to "confiscate" or "compulsorily license". The issue is *res judicata* as between the parties. This finding by the Prothonotary was in direct conflict with the determination that GSI owns copyright in its seismic data, which provides protection of its copyright for life of the last surviving author plus 50 years; that protection was confiscated and the seismic data is compulsorily licensed by the Crown's agencies after five years when it is disclosed by them. Copyright still persists in the seismic data outside of the Regulatory Regime.

3. The Prothonotary further erred in fundamentally misunderstanding the law of confiscation by holding that "[d]e facto expropriation is the statutory taking of property rights by the Government".[2] This is simply not true. It often arises through actions undertaken by the Crown based on powers and enabling provisions in legislation. As a result of this misunderstanding, the Prothonotary granted leave to amend the Statement of Claim in this Action to plead vicarious liability of servants or agents of the Crown for torts, but that leave restricts GSI from alleging the primary cause of action, which is *de facto* expropriation as a result of actions taken by the Government.

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[1] *Geophysical Service Inc v Canada*, 2018 FC 670 [***Decision***] [**TAB 1**].
[2] *Decision, supra* at para 20 [TAB 1].

PART I. STATEMENT OF FACTS

4. The following facts are taken either from the original Statement of Claim in this Action or the law upon which it relies.

5. GSI, and its predecessors provided seismic data services to the Canadian oil and gas industry, including non-exclusive seismic data creation, licensing, storage and processing of seismic, gravity and magnetic data.[3]

6. Pursuant to various federal regulations, GSI and its predecessors were required to submit offshore seismic data that they created and processed (the "Seismic Data") to various Crown agencies listed at paragraph 8 of the Statement of Claim (collectively, the "Crown Agencies").[4] GSI and its predecessors submitted the Seismic Data to the Government of Canada (the "Government") through the Crown Agencies since 1969.[5]

7. Seismic data is copyrightable.[6] The Seismic Data submitted by GSI and its predecessors to the Crown Agencies, or now in the possession of those government entities, has previously been determined by the Court of Queen's Bench of Alberta, as between GSI and the AGC, to be copyright works[7] in accordance with the Supreme Court of Canada's decision in *CCH Canadian Ltd v Law Society of Upper Canada*.[8] It has also been held that GSI is the owner of the copyright in the Seismic Data held by the Crown Agencies.[9]

8. The Seismic Data is also confidential and GSI has always communicated the confidentiality of the Seismic Data and its copyright protection to recipients of the Seismic Data, including the Crown Agencies to which it submitted the Seismic Data.[10]

9. GSI has not, impliedly or expressly, authorized, granted or consented to the granting of a

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[3] Statement of Claim of Geophysical Service Incorporated, filed July 12, 2017 (the "**Statement of Claim**") at para 2 **[TAB A]**.
[4] Statement of Claim, *supra* at paras 8 and 12, 13 and Schedule "B" [TAB A].
[5] Statement of Claim, *supra* at Schedule "A" [TAB A].
[6] *Geophysical Services Incorporated v EnCana Corporation*, 2016 ABQB 230 at para 115 [***Common Issues Trial***] **[TAB 2]**.
[7] *Geophysical Service Incorporated v 612469 Alberta Limited (CalWest Printing & Reproductions)*, 2016 ABQB 356 at para 18 [***CalWest***] **[TAB 3]**; Statement of Claim, *supra* at paras 13, 17, 22-23 [TAB A].
[8] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2014] 1 SCR 339 **[TAB 4]**.
[9] *CalWest*, *supra* at paras 31-32 [TAB 3].
[10] Statement of Claim, *supra* at paras 12, 17, 28-30 [TAB A].

licence, in any form, to the Government in respect of the Seismic Data to do any activities that are exclusive to the copyright owner under the *Copyright Act*.[11]

10. Nevertheless, the Government disclosed and continues to disclose the Seismic Data to third parties,[12] without GSI's consent or knowledge, pursuant to the Regulatory Regime.[13] In its decision in *Geophysical Service Incorporated v EnCana Corporation* (the "Common Issues Appeal"), the Alberta Court of Appeal interpreted the Regulatory Regime to permit the Crown Agencies to disclose the Seismic Data to the public[14] and found that GSI lost its right to enforce against copyright infringement, for those disclosures pursuant to the Regulatory Regime.

PART II. ISSUES

11. The issues raised in this Motion to Appeal the Decision are as follows:

a) Whether the Decision ignored or gave no weight to jurisprudence finding that the legislative scheme regarding offshore seismic data in Canada is confiscatory or a compulsory license and misinterpreted the terms "confiscatory" and "compulsory license".

b) Whether the Decision erred in holding that Government conduct does not amount to *de facto* expropriation, confiscation, or unauthorized, regulatory or compulsory taking, such that it should only be pleaded as vicarious liability against the Crown arising out of the torts of its servants or agents under the *Crown Liability and Proceedings Act*.[15]

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[11] *Copyright Act*, RSC 1985, c C-42 [***Copyright Act***] [**TAB 5**].
[12] Statement of Claim, *supra* at paras 19-20 and Schedule "C" [TAB A].
[13] Schedule "C" to the Statement of Claim lists all the relevant disclosure provisions that comprise the disclosure portions of the Regulatory Regime, as that is defined in the Common Issues Decision [TAB A]. These Submissions refer to section 101 of the *Canada Petroleum Resources Act*, RSC 1985, c C-36 (2nd supp) [***CPRA***] instead of each of the nearly identical disclosure provisions [**TAB 6**].
[14] *Geophysical Service Incorporated v EnCana Corporation*, 2017 ABCA 125 at paras 104-105 [***Common Issues Appeal***] [**TAB 7**], affirming findings from *Common Issues Trial*, *supra* at para 318 [TAB 2], leave to appeal to SCC refused, 2017 Carswell Alta 2545 [**TAB 8**].
[15] *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [**TAB 9**].

PART III. SUBMISSIONS

Standard of Review

12. A prothonotary's decision on a motion to strike pleadings ought not be disturbed on appeal to a judge unless it raises questions vital to the final issue of the case, or the decision is clearly wrong in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.[16]

13. Where the effect of a prothonotary's decision was to preclude the hearing of matters on their merits as a result of those matters being struck, such decision is one that raises a question vital to the result of the case.[17] In such a case, the court of appeal is required to exercise discretion *de novo*.[18]

14. As this partial Appeal involves a decision to strike a statement of claim, it necessarily involves questions vital to the final issue of the case. Therefore, this Court ought to exercise its discretion *de novo* in this partial Appeal.

It is *Res Judicata* that the Seismic Data was Confiscated or Compulsorily Licensed

15. The Prothonotary erred in law in ignoring or giving no weight to the fact that the issue of whether the Regulatory Regime is confiscatory and constitutes a compulsory licence has already been decided. She did so despite noting that GSI and the AGC "were both parties to the Alberta actions, the determinations of fact and law made in these actions are binding upon them, and it is appropriate for the Court to take them into account on this motion"[19]. In other words, the issue of whether the Seismic Data was confiscated is *res judicata* as between GSI and the AGC.

16. The Decision is in direct conflict with the decisions of both levels of court in Alberta which

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[16] *R v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (FCA) at 463, [1993] 1 CTC 186 at para 62 [**TAB 10**]; as affirmed by *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 at para 18 [**TAB 11**]; as modified by *Merck & Co v Apotex Inc*, 2003 FCA 488, [2003] FCJ No 1925 at paras 17-19 [**TAB 12**].
[17] *Hamilton-Wentworth (Regional Municipality) v Canada (Minister of the Environment)*, [2000] FCJ No 440 (Fed TD), 96 ACWS (3d) 405 at para 31 [**TAB 13**].
[18] *Society of Composers, Authors & Music Publishers of Canada v Landmark Cinemas of Canada Ltd*, 2004 FCA 57, [2004] FCJ No 219 at paras 12-14 [**TAB 14**].
[19] *Decision, supra* at para 5 [TAB 1].

held that GSI's copyright has been "confiscated" by the Regulatory Regime.[20] The Court of Queen's Bench of Alberta also held in the trial decision in *Geophysical Services Incorporated v EnCana Corporation* (the "Common Issues Trial"; together with the Common Issues Appeal, the "Common Issues Decisions") that the Regulatory Regime created a "compulsory licence".[21]

17. In the Common Issues Trial, the Court of Queen's Bench held:

a) that "GSI has **full copyright and other proprietary rights over its seismic data**, but the Regulatory Regime applies to the extent that it conflicts with the *Copyright Act*; the Regulatory Regime, in effect, creates a **compulsory licence** over the data in perpetuity after the expiry of the confidentiality or privileged period";[22]

b) that "GSI has been forced to grant, in effect, a **compulsory licence** to permit its offshore seismic data to be released and used by the public";[23] and

c) that "the Regulatory Regime has **confiscated** the seismic data created over the offshore and frontier lands".[24] [emphasis added]

18. These findings were fully adopted by the Court of Appeal in the Common Issues Appeal.[25] The Court of Appeal further explained "that means GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period".[26]

19. The Prothonotary even noted that "GSI appears to be latching on to the Alberta Courts' description of the regulatory regime as "confiscatory" in nature and having the effect of a "compulsory license" as grounds to claim compensation for *de facto* expropriation or the determination of a compulsory royalty rate."[27] So, those findings should have been taken

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[20] *Common Issues Trial*, *supra* at para 322 [TAB 2]; *Common Issues Appeal*, *supra* at para 106 [TAB 7].
[21] *Common Issues Trial*, *supra* at para 317 [TAB 2].
[22] *Common Issues Trial*, *supra* at para 321 [TAB 2].
[23] *Common Issues Trial*, *supra* at para 317 [TAB 2].
[24] *Common Issues Trial*, *supra* at para 322 [TAB 2].
[25] *Common Issues Appeal*, *supra* at para 104 [TAB 7].
[26] *Common Issues Appeal*, *supra* at para 104 [TAB 7].
[27] *Decision*, *supra* at para 13 [TAB 1].

into account in the Decision.

20. The doctrine of *res judicata* has two distinct forms: issue estoppel and cause of action estoppel. The main principle of issue estoppel is that the question decided in the first proceeding must be the same as the question to be decided in the second proceeding, and the question must be fundamental to the decision in the first proceeding and not collateral to it.[28] On the other hand, cause of action estoppel stops a party from opening "the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because [the party has], from negligence, inadvertence, or even accident, omitted part of [its] case."[29]

21. For issue estoppel to apply, three requirements must be present:

a) the same question has been decided;

b) the judicial decision which is said to have created the estoppel was final; and

c) the parties to the judicial decision were the same persons as the parties to the proceedings in which estoppel is raised.[30]

22. The question of the effect of the Regulatory Regime was already decided as between GSI and the AGC by the Alberta Courts in the Common Issues Decisions. The Prothonotary took judicial notice of the determination of that question and that both GSI and the AGC, the parties in this Action, were parties in the Common Issues Decisions. The determination that the effect of the Regulatory Regime amounts to confiscation was finally determined, as it was appealed to and affirmed by the Alberta Court of Appeal, and further denied leave to appeal by the Supreme Court of Canada. The finding of confiscation should not be disturbed as issue estoppel applies

23. Nevertheless, the Decision took a marked departure from the Alberta Courts' findings when the Prothonotary determined that there was no *de facto* expropriation. The Decision

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[28] *Angle v Minister of National Revenue*, [1974] SCJ No 95 (SCC), [1975] 2 SCR 248 at para 3 [***Angle***] [**TAB 15**].
[29] *Maynard v Maynard*, [1951] 1 DLR 241 (SCC), [1951] SCR 346 at para 32 [**TAB 16**], citing *Green v Weatherill*, [1929] 2 Ch 213 at 221, 222 [**TAB 17**], which in turn cites with approval *Henderson v Henderson*, (1843) 3 Hare, 100 at 115 [**TAB 18**].
[30] *Angle, supra* at para 3 [TAB 15].

held that no property interest was taken from GSI because no property right existed in the face of the Regulatory Regime. The Prothonotary further erroneously, and contrary to the Common Issues Decisions, held that the copyright GSI has in the Seismic Data did not arise independently from the Regulatory Regime.[31]

24. That finding was not open to the Prothonotary to make in the face of the Alberta Courts' finding that GSI's copyright was "confiscated" and that GSI was forced to grant a "compulsory license". The finding of confiscation by the Alberta Courts was based upon the other major determination by the Alberta Courts: that there is copyright in seismic data. By determining that there is copyright, protected under the *Copyright Act*, in seismic data, it was then further held that the Regulatory Regime took those protected rights away from GSI when the Government undertook actions, specifically, disclosure of GSI's seismic data, pursuant to the Regulatory Regime.

25. The Alberta Courts held that "GSI has full copyright and other proprietary rights over its seismic data".[32] They did not hold that GSI had a limited copyright or limited proprietary rights. It was only in the instance in which the Regulatory Regime was engaged by the Government that a conflict arises. That is not so in any other instance. In fact, GSI still retains copyright and other proprietary rights in the Seismic Data in respect of copyright infringements outside of the Regulatory Regime's operation. It is not as though GSI no longer has any copyright in circumstances in which a person copies the Seismic Data beyond the scope of the Regulatory Regime; as the Alberta Court of Appeal held, it merely has lost its ability, by the confiscation effected under the Regulatory Regime, to interfere with decisions made by the Government relating to Seismic Data.[33]

26. Furthermore, it is noteworthy that the AGC asserted in its Motion to Strike that the issue of whether compensation was owing for *de facto* expropriation was *res judicata* on the basis of the Common Issues Trial's finding that section 111 of the *Canada Petroleum Resources Act*[34] precludes compensation for the confiscation.[35] That finding necessarily

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[31] *Decision*, *supra* at para 14 [TAB 1].
[32] *Common Issues Trial*, *supra* at para 321 [TAB 2].
[33] *Common Issues Appeal*, *supra* at para 104 [TAB 7].
[34] *CPRA*, *supra*, s 111 [TAB 6].
[35] *Common Issues Trial*, *supra* at paras 237, 243 322 [TAB 2].

in the Common Issue Trial implies that found that there was confiscation, or there would be no need to consider whether compensation was precluded by the Regulatory Regime or not. Ultimately, the Common Issues Appeal held that the issue of compensation was not decided by the Common Issues Trial,[36] but reiterated the finding of confiscation of copyright under the Regulatory Regime.

27. Although the Prothonotary did not agree with the AGC on its interpretation of Section III of the CPRA, it is plain and obvious that the AGC has taken the position that there was a confiscation of the Seismic Data and, if it did not wish to take such a position, it could have raised it in the Common Issues Trial or the Common Issues Appeal, which it did not. Instead, the AGC asserted that the Regulatory Regime took the Seismic Data. The AGC also asserted in the Common Issues Trial that it had crown copyright in the Seismic Data.[37] Therefore, the AGC is further estopped from asserting that seismic data was not confiscated by the Crown in this Action on the basis of cause of action estoppel.

28. Finally, in considering the very terms used by the Alberta Courts, it is clear that those Courts determined that the Regulatory Regime takes intellectual property rights in seismic data. For instance, to "confiscate" necessarily implies that there was something that exists to be taken. Similarly, "compulsory license" necessarily implies that there was something that exists that is compelled to be licensed, used or accessed. That something is the copyright in the seismic data that the Alberta Courts confirmed to exist, regardless of the Regulatory Regime. The effect of the Regulatory Regime is to take that copyright protection away om the circumstances in which the Regulatory Regime operates.

29. In turning to other legal definitions of the term "confiscate", it is always implicated that there is something that exists in the first place in order for it to be taken:

    a) the New Oxford Dictionary has defined "confiscate" as:

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[36] *Common Issues Appeal*, *supra* at paras 104-107 [TAB 7].

[37] For example, Court of Queen's Bench of Alberta Action No. 0901-08210, Statement of Defence to Amended Amended Statement of Claim of Attorney General of Canada at paras 39-45, 47-50 at 54 [**TAB B**].

i. property appropriated to the use of the sovereign or the public, adjudged forfeited; [38]

ii. to take away by exercise of authority from the individual (what belongs to him);[39]

iii. to deprive (a person) of his property as forfeited to the State;[40]

iv. to forfeit to the sovereign or state;[41]

v. to seize as if by authority; to take forcible possession of, to appropriate summarily;[42]

b) Stroud's Judicial Dictionary of Words and Phrases defines "confiscation" as "[c]onfiscation must be an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government; though the proceeds may not, strictly speaking, be brought into its treasury."[43] This definition has been derived from 1812 English decision, *Levin v Allnutt.*[44]

c) Barron's Canadian Law Dictionary defines "confiscation" as "to take private property without just compensation; to transfer property from a private use to a public use";[45]

d) In *R v Liebman*, Justice Kelley of the then Ontario High Court of Justice noted that "[t]he word "confiscate" has been defined to mean "to appropriate private property to the Sovereign or to the public treasury";[46]

e) In *Auger v St. Paul L'Ermite (Paroisse)*, Justice Barclay of the Superior Court of Quebec, writing in the majority, stated: "Confiscation is in reality the appropriation under legal authority of private property by the State";[47] and

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[38] *The Oxford English Dictionary, sub verbo* "confiscate", online: <http://www.oed.com/> **[TAB 19]**.
[39] *The Oxford English Dictionary, sub verbo* "confiscate", online: <http://www.oed.com/> **[TAB 20]**.
[40] *The Oxford English Dictionary, sub verbo* "confiscate", online: <http://www.oed.com/> [TAB 20].
[41] *The Oxford English Dictionary, sub verbo* "confiscate", online: <http://www.oed.com/> [TAB 20].
[42] *The Oxford English Dictionary, sub verbo* "confiscate", online: <http://www.oed.com/> [TAB 20].
[43] Stroud's Judicial Dictionary of Words and Phrases, 9th ed, *sub verbo* "confiscation" **[TAB 21]**.
[44] *Levin v Allnutt*, 15 East 269, [1812] EngR 169 **[TAB 22]**.
[45] Barron's Canadian Law Dictionary, 4th ed, *sub verbo* "confiscate" **[TAB 23]**.
[46] *R v Liebman*, [1943] 1 DLR 745 (OntHCJ), [1943] OWN 66 at para 2 **[TAB 24]**.
[47] *Auger v St Paul L'Ermite (Paroisse)*, 1942 CarswellQue 93, [1942] Que KB 725 at para 55 **[TAB 25]**.

f) In *R v Caslake*, the Supreme Court of Canada held in respect of the concept of confiscation: "agents of the state can only enter onto or confiscate someone's property when the law specifically permits them to do so. Otherwise, they are constrained by the same rules regarding trespass and theft as everyone else..." [emphasis added][48]

30. Moreover, in ignoring the jurisprudence finding that the Regulatory Regime is confiscatory, the Prothonotary also erred in ignoring the *Berne Convention for the Protection of Literary and Artistic Works* (the "*Berne Convention*"),[49] as implemented by section 91 of the *Copyright Act*.[50]

31. The *Berne Convention* sets the term of copyright protection at 50 years after the author dies.[51] The Common Issues Decisions recognized that copyright could not be limited to only five years in respect of offshore seismic data, instead determining that the copyright had been confiscated and compulsorily licensed after the five-year period, rather than the copyright not existing after the five-year period. Authors are entitled to the full term of protection under Canadian copyright law.

32. In conclusion, the issue of whether the Regulatory Regime confiscates the intellectual property rights in the Seismic Data has already been decided. It was not open for the Prothonotary, especially on a motion to strike, to make a determination in direct conflict with this issue as it was *res judicata*. There was a final determination when the Supreme Court of Canada denied leave to appeal on the Common Issues Decisions and that determination was made as between GSI and the AGC. The AGC asserted the position that the Regulatory Regime enabled the transfer of the copyright in the Seismic Data from GSI. The AGC cannot suck and blow on this issue and it is clear that confiscation and *de facto* expropriation are a cause of action that GSI should be permitted to pursue. The high bar for a striking motion was not met on the AGC's Motion to Strike and the Decision erred in law as a result.

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[48] *R v Caslake*, [1998] 1 SCR 51 (SCC), [1998] SCJ No 3 at para 12 [**TAB 26**].
[49] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, UNTS 828 at 221 [*Berne Convention*] [**TAB 27**].
[50] *Copyright Act*, *supra*, s 91 [TAB 5].
[51] *Berne Convention*, *supra*, Article 7(1) [TAB 27].

Confiscation Can Occur Through the Exercise of Government Discretion

33. As a consequence of a misapprehension of the cause of action of confiscation, the Prothonotary further erred in law in finding that GSI can only plead vicarious liability against the Crown arising out of the torts of its servants or agents under the *Crown Liability and Proceedings Act* for unauthorized taking.[52]

34. The Prothonotary erred in law in finding that *de facto* expropriation is the **statutory** taking of property rights by government.[53] However, in law, *de facto* expropriation can also take the form of the taking of private property rights by government through its actions or conduct.

35. Ultimately, the Decision granted leave to amend as follows:

> The Statement of Claim is struck, with leave to amend, but only to assert and properly plead a cause of action arising from the Crown's vicarious liability in respect of alleged actions of Crown servants or agents going beyond the scope of the legislation or of alleged disclosure made prior to the expiration of the privilege period.[54]

36. This finding simply ignored that these claims were already asserted in the Statement of Claim. This finding was also made in the face of the Prothonotary noting, at paragraph 2 of the Decision, that GSI claimed "the expropriation was effected through a legislative and **regulatory scheme** enacted **and operated pursuant to various statutes**" [emphasis added] and, at paragraph 3, that "the Crown agencies were then **permitted** to, did and will in the future, disclose the data to third parties without GSI's knowledge or consent" [emphasis added].[55]

37. Despite acknowledging that GSI's allegations included allegations that the Crown Agencies were permitted under the regulatory scheme to expropriate the Seismic Data, and therefore, involve considering the conduct of the Crown servants, the Prothonotary erroneously concludes, that the "Statement of Claim thus asserts that the legislative scheme effectively takes away GSI's copyright and other confidentiality and proprietary rights over

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[52] *Decision*, *supra* at paras 35-36 [TAB 1].
[53] *Decision*, *supra* at paras 20 [TAB 1].
[54] Order per *Decision*, *supra* at 16 [TAB 1].
[55] *Decision* at paras 2-3 [TAB 1].

the data".[56]

38. Coupled with that incorrect interpretation of the Statement of Claim is the misinterpretation of the jurisprudence regarding *de facto* expropriation.

39. *De facto* expropriation, confiscation, or unauthorized, regulatory or compulsory taking are all ways to describe a cause of action that requires careful scrutiny of government conduct, whether by legislation or the exercise of discretion, and consideration of its effects on private property.

40. It is well-established that, where the Crown takes private property, there is a *prima facie* right to compensation, unless a statute explicitly precludes it.[57] This principle has been described as both a rule of statutory construction and as a common law right.[58]

41. There are several cases in which it was determined that *de facto* expropriation was effected through the exercise of discretion or the operation of a regulatory scheme enabled by legislation, and not by the legislation itself, including:

    a) *The Queen in Right of British Columbia v Tener*:[59] The respondents owned titles to mineral interests in land now located within the Wells Gray Provincial Park, as designated under British Columbia's *Parks Act*. The *Parks Act* prohibited exploration and development of natural resources within the park except as authorized by a permit issued by the Minister. The respondents' applications for the requisite permit were rejected on the basis that no new exploration or development work would be authorized within a provincial park under the then current Parks Branch policy. The Supreme Court of Canada found that the refusal of a permit required to remove the minerals made the prohibitions in the *Parks Act* operative and reduced the respondents' rights in the minerals, constituting expropriation of the respondents' mineral interests by way of the exercise of the

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[56] *Decision* at para 3 [TAB 1].
[57] Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3rd ed (Carswell: Scarborough, 2000) at 136-137 [**TAB 28**].
[58] *Manitoba Fisheries Ltd v R*, [1978] SCJ No 78 (SCC), [1979] 1 SCR 101 at para 16, citing *Belfast Corp v OD Cards Ltd*, [1960] AC 490 at 523, [1960] 1 All ER 65 (HL) [**TAB 29**].
[59] *The Queen in Right of British Columbia v Tener*, [1985] 1 SCR 533 (SCC), [1985] SCJ No 25 [**TAB 30**].

discretion of the Parks Branch by way of its policy. It was only when the policy to reject permit applications was implemented, which was always possible under the *Parks Act*, that *de facto* expropriation arose. Similarly, in the Common Issues Trial, it was held that the policies of the Crown Agencies to disclose seismic data led to the confiscation of the copyright in the Seismic Data.

b) *Casamiro Resource Corp v British Columbia (Attorney General)*:[60] The respondents held titles to mineral interests in land now located within Strathcona Park. Under the *Parks Act*, a resource use permit issued by the Minister Responsible for Parks (the "Minister") was required for resource development within the park. Under the *Environment and Land Use Act*, the Lieutenant Governor in Council could make orders respecting the environment or land use. The Lieutenant Governor subsequently issued an Order in Council prohibiting the Minister from issuing resource use permits under the *Parks Act* for mineral exploration within the Strathcona Park. The respondents' application for a resource use permit was consequently denied. The Court found that the Order in Council had the practical effect of reducing the respondents' mineral interests to "meaningless pieces of paper" and deprived the owners' rights, amounting to expropriation of those mineral interests. Similarly, in the Common Issues Appeal, GSI's exclusivity to its copyright ended as a result of the operation of the policies under the Regulatory Regime such that GSI had no ability to enforce its copyright protections as against those parties that access the Seismic Data from the Crown Agencies.[61]

c) *Lynch v St. John's (City)*:[62] To facilitate water delivery for the respondent, the City of St. John, the Newfoundland and Labrador legislature enacted a statute (the "*City Act*") that provided for the City's possession and control of certain water bodies, including the Broad Cove River ("BCR") Watershed. Specifically, the *City Act* empowered the City to expropriate land for preventing the pollution of waterways,

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[60] *Casamiro Resource Corp v British Columbia (Attorney General)*, [1991] BCWLD 1425 (BCCA), 26 ACWS (3d) 1137 **[TAB 31]**.
[61] *Common Issues Appeal, supra* at para 104 [TAB 7].
[62] *Lynch v St. John's (City)*, 2016 NLCA 35, [2016] NJ No 249 **[TAB 32]**.

and prohibited building on land within the BCR Watershed except where recommended by the City Manager. The *City Act* did not expressly identify factors that the City Manager must consider in deciding whether or not to make the recommendation. The appellant, the Lynch family, owned property located in the BCR Watershed and applied to develop a subdivision on its property. The Lynches' application was denied. The City's Watershed Management Plan provided that building controls had been imposed in order to maintain flow of groundwater within the BCR Watershed, and the City took the position that the City Manager was entitled to refuse all applications for building on the land. The Newfoundland Court of Appeal found that the *City Act* coupled with the exercise of the City Manager's discretion resulted in *de facto* expropriation by removing all reasonable uses of the Lynches' property. Similarly, as alleged in the Statement of Claim in this Action, the actions of the Crown Agencies pursuant to the Disclosure Legislation and outside the scope of the Disclosure Legislation are alleged to have resulted in *de facto* expropriation.[63]

d) *AG v De Keyser's Royal Hotel Ltd.*:[64] Regulations made under the *Defence of the Realm Consolidation Act, 1914* empowered the military to take possession of any land or buildings for the purpose of securing public safety or the defence of the realm. The plaintiff's hotel was occupied during the war by the Crown's officers pursuant to that Act. The plaintiff sought compensation for the occupation of the hotel. The Crown asserted that the occupation occurred under its royal prerogative and that the plaintiff had no legal right to compensation. However, the House of Lords held that the plaintiff was entitled to compensation despite the fact that the Act always enabled the Crown to do as necessary during times of war. Similarly, the Statement of Claim in this Action alleges that the actions of the Crown pursuant to the Disclosure Legislation enabled the Crown to obtain beneficial interests in the Seismic Data for which compensation should be awarded to GSI.

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[63] Statement of Claim, *supra* at para 36 [TAB A].
[64] *AG v De Keyser's Royal Hotel Ltd*, [1920] All ER Rep 80 (HL), [1920] AC 508 **[TAB 33]**.

e) *France Fenwick & Co v R*:[65] regulation enacted under the *Emergency Powers Act, 1920* empowered the government to requisition ships, prohibit the unloading of ships, and take possession of coal during the then existing coal strike. The plaintiffs owned a steamship that brought a cargo of coal into a dock on April 2. A customs officer, acting under the authority of the regulation, refused to let the ship discharge the coal. The ship buoyed for several days with coal on board until the government requisitioned the coal on April 22; the discharge was completed on April 23. The Court of King's Bench held that the plaintiffs could only be compensated for the period of April 22 and 23, as the ship had not been requisitioned until then, ultimately holding that *de facto* expropriation could arise from the exercise of authority under the regulation. Similarly, in this Action, GSI alleges that the actions undertaken by the Crown Agencies under the Regulatory Regime gave rise to *de facto* expropriation for which compensation is due to it.

42. Additionally, in *Canadian Pacific Railway v Vancouver (City)*, the Supreme Court of Canada enounced a two-part test for *de facto* taking of property that requires compensation:

a) an acquisition of a beneficial interest in the property or flowing from it, and
b) removal of all reasonable uses of the property.[66]

This two-part test for *de facto* taking also does not indicate that the taking occur by statute. Any such interpretation of the cause of action is unduly restrictive and flawed. It is the effect on private property that is at issue in a claim for *de facto* expropriation.

43. It is clear that the taking of private property rights by the Crown's exercise of discretion and regulation have given rise to compensation awards by Canadian and English courts. Such claims are not construed as only torts of servants or agents of the Crown under the *Crown Liability and Proceedings Act*. Successful *de facto* expropriation cases are also not predicated upon a finding that new legislation has been enacted or that the taking must occur by legislation alone.

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[65] *France Fenwick & Co v R*, [1927] 1 KB 458 [**TAB 34**].
[66] *Canadian Pacific Railway v Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227 at para 30 [**TAB 35**].

44. It is submitted that the Prothonotary erred in law by misapprehending the scope of the cause of action of *de facto* expropriation, unnecessarily limiting it to arising only in cases where legislation has changed as opposed to the exercise of authority or discretion enabled by legislation. The jurisprudence is broader and does include cases in which compensation was awarded for the exercise of authority or discretion enabled by legislation where the result was a taking of property rights. GSI alleges that its copyright and confidentiality in the Seismic Data has been taken by the actions of the Government pursuant to the Regulatory Regime and it should be allowed to proceed to test that claim in this Court.

Consequential Losses

45. The Decision did not address the claim for injurious affection beyond anchoring it to *de facto* expropriation and implying that, if *de facto* expropriation could not be maintained against the AGC, the claim for injurious affection was struck. Therefore, it is submitted that, as a result of the foregoing errors of law in the Decision, the claims related to injurious affection should be reinstated in the Statement of Claim in this Action. The claims are for consequential losses related to the alleged *de facto* expropriation and should be open for exploration in this Action.

PART IV. CONCLUSION

46. GSI submits that the Decision is based on fundamental errors of law regarding the cause of action alleged in this Action – chiefly, *de facto* expropriation – and the determinations that have already been made between the parties on that issue in the Alberta Courts.

47. This was a motion to strike a claim. The tast for striking is very high for the Applicant . Essentially, the question for the Prothonotary was: were facts pleaded to allege a cause of action. They were, and the Common Issues Decisions support that a cause of action exists.

48. It is unequivocal that, upon a review of the evidence before them, the Alberta Courts found that the copyright in the Seismic Data has been confiscated from GSI. There can be no dispute about that and it was not open for the AGC to assert otherwise in this proceeding or for the Prothonotary to decide otherwise on an issue that is *res judicata* as between the parties. Additionally, at this early stage of the proceedings, it is especially troubling that

the claim could be struck by this Court without evidence when, in contrast, the Alberta Courts with evidence before them, made the finding that there was a confiscation and compulsory licence. GSI should be entitled to explore its claims in *de facto* expropriation and injurious affection and the evidence related to them.

49. It is clear that the Alberta Courts viewed the matter as confiscation, that confiscation implies that there was a property right to be taken, that confiscation has been held to mean that property was taken by the state, and that the cause of action of *de facto* expropriation (also known as confiscation) can arise, and has so arisen, in circumstances where the actions of government, enabled by legislation, have the effect of taking private property rights. The Decision took an unduly restrictive view of GSI's claim, contrary to the Common Issues Decisions.

50. In conclusion, GSI submits that:

a) This Appeal should be allowed;

b) GSI should be granted leave to amend its Statement of Claim in this Action to re-assert its initial allegations and claims in the Statement of Claim filed July 12, 2017;

c) GSI should be granted costs of this Appeal; and

d) Such further and other relief as this Court deems necessary or appropriate to grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF OCTOBER, 2018.

BORDEN LADNER GERVAIS LLP

Per: 

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